IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.01.2007

Coram:

The Honourable Mr.A.P.SHAH, CHIEF JUSTICE
and
The Honourable Mr.Justice K.CHANDRU

W.A.No.1624 of 2006
and
M.P.No.1 of 2006

E.Shahul Hameed .... Appellant/Petitioner

Vs.

State of Tamil Nadu
Rep. by its Chief Secretary,
Fort St.George,
Chennai - 600 009. .... Respondent/Respondent

Writ Appeal filed under Clause 15 of the Letters Patent against the order passed in W.P.No.3466 of 2006 dated 6.12.2006.

For Appellant :::: Mr.R.Sankarasubbu

For Respondent :::: Mr.Raja Kalifulla
Government Pleader
assisted by
Mr.V.R.Thangavelu,
Government Advocate

J U D G M E N T

(The Judgment of the Court was delivered by Hon'ble The Chief Justice)

Admit. The learned Government Pleader waives service for the respondent-State.

2. By consent, the writ appeal is taken up for hearing.

3. The appellant is the original writ petitioner. He has filed the writ petition seeking a direction to the respondent-State of Tamil Nadu to consider his representation dated 2.1.2006 for

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reviewing his case in C.C. No. 1 of 1997 pending on the file of the Designated Court, Tirunelveli by a Review Committee/Screening Committee in the light of the decision of the Supreme Court in Kartar Singh v. State of Punjab (1994 (3) SCC 569). The appellant is facing trial for the offences under Sections 120(B) and 302 of IPC, and also for the offences under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short 'TADA'). The contention of the appellant is that the provisions of TADA do not attract in the instant case, and the case should be tried as a regular Sessions Case, and hence the State has to take necessary steps for reviewing and transferring the case to the regular Sessions Court. By the impugned order, the learned single Judge has dismissed the writ petition holding that the Supreme Court's direction would apply only to those cases which are pending at the stage of investigation, and the instant case is not at the stage of investigation, but at the trial stage, and hence the directions issued by the Supreme Court in Kartar Singh's case (cited supra) is not applicable. According to the learned single Judge once the trial in a case has commenced or is pending, or charge sheet is filed, and cognizance is taken by the Court, the Criminal Court alone is having power either to charge, discharge, acquit or convict and pass necessary orders.

4. Mr.R.Sankarasubbu, learned counsel appearing for the appellant, strenuously contended that the learned single Judge has completely misconstrued the judgment of the Supreme Court in Kartar Singh's case. Learned counsel urged that all cases under TADA, whether at the investigation stage or at the trial stage, are required to be reviewed by a Committee headed by a retired Judge as laid down in Shaheen Welfare Association v. Union of India, (1996) 2 SCC 616. Learned counsel also drew our attention to a judgment of the Division Bench of this Court in Government of Tamil Nadu vs. Union of India, (2004) 1 T.N.L.R. 429 (Mad) where the nature and scope of power of Review Committee was considered in the context of the provisions of Prevention of Terrorism (Amendment) Act, 2003 (in short "POTA"). On the other hand, Mr.Raja Kalifullah, learned Government Pleader appearing for the State relying upon the decision of the Supreme Court in Ghanshyam v. State of M.P & Ors., VII (2006) SLT 525 contended that in view of provisions of Section 321 of the Code of Criminal Procedure discretion to withdraw from prosecution is primarily that of Public Prosecutor and none-else and he cannot surrender the discretion to any one. Therefore the prayer of the appellant for reviewing his case by the Review Committee/Screening Committee and consequential withdrawal of the case under TADA cannot be granted.

5. In Kartar Singh v. State of Punjab, (1994) 3 SCC 569, the Supreme Court while upholding the validity of TADA, excepting Section 22 of the Act, held in paragraph-265 as follows: -

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"In order to ensure higher level of scrutiny and applicability of TADA Act, there must be a Screening Committee or a Review Committee constituted by the Central Government consisting of the Home Secretary, Law Secretary and other Secretaries concerned of the various departments to review all the TADA cases instituted by the Central Government as well as to have a quarterly administrative review, reviewing the States' action in the application of the TADA provisions in the respective States, and the incidental questions arising in relation thereto. Similarly, there must be a Screening or Review Committee at the State level constituted by the respective States consisting of the Chief Secretary, Home Secretary, Law Secretary, Director General of Police (Law and Order) and other officials as the respective Government may think it fit, to review the action of the enforcing authorities under the Act and screen the cases registered under the provisions of the Act and decide the further course of action in every matter and so on".

6. In compliance with the same, the Screening Committees or Review Committees have been constituted to review the cases lodged under TADA to examine the existence of element of terrorism attracting the said Special Act containing harsh measures. Once the Committee takes a view that it was not a case under TADA then the option was to deal with the same in ordinary criminal law, if the facts and circumstances so warrant. The said judgment of the Supreme Court speaks of high-level Officers of the Central Government or the State Government, as the case may be. But, in the later judgment, in Shaheen Welfare Association v. Union of India, (cited supra), the Supreme Court has held that a more independent and objective scrutiny of TADA cases by a Committee headed by a retired Judge, is required to be constituted. There is no dispute that this exercise has not been done by the State Government in the present case.

7. In Government of Tamil Nadu v. Union of India (cited supra), the constitutional validity of sub-sections (4) (5) (6) and (7) of Section 60 of POTA was questioned. POTA was first enacted in the year 2002 which later came to be amended by the Central Act 4 of 2004 and provided for a mandatory review of all cases registered, in the light of the decision of the Supreme Court in Kartar Singh's case. Section 60 of the POTA incorporated provisions for constitution of one or more Review Committees for the purposes of the Act. The validity of the Act was challenged mainly on the ground that the provisions contained in sub-sections (4) to (7) of Section 60 of POTA are unconstitutional as they encroach upon the judicial power of the State, and as the investigation was already

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completed and trial is in progress after rejecting the plea of discharge, the Review Committee cannot sit as a parallel judicial body and try to adjudicate regarding the existence of prima facie case and if permitted, would tantamount to encroaching on the judicial power of the State, thus violating the constitutional scheme. The Division Bench expressly rejected this argument and held as follows: -

> "14(b) Now, the cases lodged against the accused/respondents under POTA are at part-heard trial stage. Eight witnesses have been examined on behalf of the prosecution and the time has been set by the High Court earlier in bail petitions, to conclude the trial by the end of June 2004. But that cannot stop the Review Committee from considering the matter as to the existence of the prima facie case regarding the applicability of POTA. The exercise of power by the Review Committee cannot be termed as scuttling the judicial process. In our constitutional scheme, the powers of Legislature, Executive and Judiciary are earmarked and no organ can encroach on the powers of the other and every organ has to be within the limitations prescribed by the Constitution. We need not refer to several judicial precedents set by the Supreme Court on this point. Suffice it to refer the latest judgment of the Supreme Court in Bakhwar Trust v. M.D.Narayanan, AIR 2003 SC 2236, laying down the legal principles that a Legislature can remove the basis of a judgment but cannot annul a judgment. In a criminal case, which is cognizable, the Court frames charges on satisfaction of existence of prima facie case. But that is not a decision on merits. Even the negation of plea of discharge cannot be construed as a decision that accused are liable to be convicted. Criminal cases are deemed to be pending and can be concluded only on the delivery of judgment. Upto that stage, the prosecution can always be withdrawn subject to such limitations as are prescribed in Section 321, Code of Criminal Procedure. Of course, there is a difference in the stages of withdrawal. If withdrawal is made before framing of charge, the effect is discharge. But if it is made after framing of the charges, it is acquittal. No discharge can be ordered after the charge is framed. Acquittal is the only course open. The prosecuting agency ceases to have its role once the charge-sheet is accepted by the Court and the charges are framed. It has to proceed with the case and the investigating officer has got no choice. But if the matter is brought to the notice of the Public Prosecutor and particularly from the State Government seeking withdrawal of prosecution, steps can be taken in that

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regard. A plea made to the Public Prosecutor to withdraw the proceedings cannot be construed as an encroachment on the judicial power. At any stage before the pronouncement of the judgment in a criminal case, the State Government can instruct the Public Prosecutor to withdraw the prosecution. In POTA also, the State Government can exercise such power. But if it is not willing to do so, it does not bar the Review Committee exercising the powers under Section 60 thereof and the Review Committee can always decide as to whether, in its opinion, the case is a fit one to proceed further even if it is in part-heard stage. If the Review Committee comes to the conclusion that the case is fit to be withdrawn from prosecution under POTA, it can address the State Government, which, in turn, has to instruct the Public Prosecutor to invoke Section 321 of Code of Criminal Procedure. The role of Review Committee is limited only that far and no further. When the role of the Review Committee ends, then it is for the Public Prosecutor to apply his mind independently according to the well-settled legal principles interpreting Section 321 of Code of Criminal Procedure and ultimately it is for the Special Court trying the cases to decide whether the plea of the Public Prosecutor to withdraw the prosecution, if made, is acceptable or not. The submissions of Mr.V.T.Gopalan that sub-section (2) with its proviso of Section 195 of Code of Criminal Procedure has to be made applicable for withdrawing the prosecution under POTA cannot be accepted. It is only Section 321 of Code of Criminal Procedure, which is applicable for withdrawing prosecution under POTA. Hence, we hold that upto the stage of formulating an opinion regarding prima facie case under POTA, the Review Committee's decision, one way or the other, cannot amount to interference in the judicial process. We next proceed to the last point."

8. The above decision of the Division Bench has been upheld by the Supreme Court, and the Special Leave Petition was dismissed with the reasoned order.

9. In our opinion, the role of the Review Committee/Screening Committee is completely misconstrued by the learned single Judge. It is clearly seen from the observations in paragraph-265 of the decision in Kartar Singh’s case that the Review Committee or Screening Committee has to be constituted by the Central Government/State Government to review the action of the enforcing authorities under TADA and screen the cases registered under the provisions of TADA and decide the further course of action in every matter. The exercise of power by the Review Committee cannot be

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termed as an encroachment on the judicial power. The Review Committee/Screening Committee constituted in terms of the decision in Kartar singh's case can always decide as to whether, in its opinion, the case is a fit one to proceed even if it is at the trial stage. If the Review Committee/Screening Committee comes to a conclusion that the case is fit to be withdrawn from prosecution under TADA, it can address the State Government, which, in turn, has to instruct the Public Prosecutor to invoke Section 321 of the Code of Criminal Procedure. The role of Review Committee or Screening Committee ends there and it is for the Public Prosecutor to carry further and apply his mind independently according to the well-settled legal principles interpreting Section 321 of the Code of Criminal Procedure and ultimately it is for the Special Court trying the cases to decide whether the plea of Public Prosecutor to withdraw the prosecution, if made, is acceptable or not. Thus, the view of the learned single Judge that only those cases, which are pending at the stage of investigation, are to be reviewed by the Review Committee is completely erroneous.

10. In the light of the foregoing direction, we direct the State Government to constitute the Review Committee/Screening Committee within a period of four weeks and refer the appellant's case to the Review Committee so constituted. The Committee upon examination of the matter placed before it shall make appropriate recommendations to the State Government within a period of four weeks there from. The State Government shall thereafter take appropriate action in accordance with the recommendation of the Review Committee. The writ appeal is, accordingly, allowed. No costs. Consequently, miscellaneous petition is closed.

pv/-

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To:

The Chief Secretary to the Government of Tamil Nadu,
Fort St.George, Chennai - 600 009.

+ 1 cc to Mr. R. Sankara Subbu, Advocate SR No. 4922
+ 1 cc to the Government Pleader, SR No.4332

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